

# “Can the Leopard Change its Spots?”—A Call for an African Dispute Resolution Mechanism

STUDENT NOTE

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## I. INTRODUCTION

In the twenty-first century, the era of globalization, global norms are shifting from the sovereign state as actor to supranational bodies that are peripheral to the nation-state.<sup>1</sup> Within this shifting paradigm the field of international law has both led and followed, through the emergence of a multitude of international dispute settlement bodies which have adopted existing norms and will undoubtedly shape future norms.<sup>2</sup> While still considered “alternative” in many domestic legal systems, Alternative Dispute Resolution (ADR) has become the standard approach to solving many international disputes.<sup>3</sup> Outside of the traditional court system, bodies and institutions have arisen around the world at varying levels (from individual to corporate to state actor) in which the relevant actors have voluntarily

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<sup>1</sup> See generally Robert O. Keohane, Andrew Moravcsik, & Anne-Marie Slaughter, *Legalized Dispute Resolution: Interstate and Transnational*, 54 INT’L ORG. 457 (2000).

<sup>2</sup> *Id.* at 457 n.1. See also David A. Lake, *Open Economy Politics: A Critical Review*, INT’L ORG. 219 (2009) (“[P]olitics is the dependent variable and how the actor is situated in the international economy is the independent variable. In reality, of course, these two sets of questions are themselves integrated.”).

<sup>3</sup> See generally Keohane et al., *supra* note 1. For a list of international dispute resolution mechanisms see *International Dispute Settlement*, ELECTRONIC INFO. SYS. FOR INT’L L., [http://www.eisil.org/index.php?sid=842972992&t=sub\\_pages&cat=788](http://www.eisil.org/index.php?sid=842972992&t=sub_pages&cat=788) (last visited May 21, 2014). See also DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, *INTERNATIONAL BUSINESS TRANSACTIONS: PROBLEMS, CASES, AND MATERIALS* 613 (2d ed. 2010) (“[I]n international business . . . [a]lternative methods of dispute settlement . . . are more frequently employed rather than the courts.”).

submitted themselves to nondomestic, extrajudicial procedures in order to resolve their disputes.<sup>4</sup>

This emphasis on ADR techniques and practices is no longer a phenomenon but has become the norm.<sup>5</sup> As regional agreements and treaties have bound certain states to particular dispute resolution mechanisms, so countries have voluntarily acceded to extraneous jurisdiction; indeed, as the wave of globalization has barreled its way around the world, so more and more nations have recognized the necessity of yielding such authority in order to achieve effective dispute resolution.<sup>6</sup> As early as 1999 there were “seventeen permanent, independent international courts . . . [twenty-three] quasi-judicial tribunals, panels, and commissions charged with similar functions . . . [and nearly sixty] bodies negotiated but not yet in operation.”<sup>7</sup> This number is constantly increasing to the point where the amount of *permanent* international arbitration, mediation, and dispute settlement mechanisms has become innumerable, and *ad hoc* tribunals of some form or other have experienced equally significant growth.<sup>8</sup>

Yet in the African continent this trend has been notable by its absence. This paper will argue that African nations are “behind the times” in their inability to commit to regional dispute settlement mechanisms. In the arena of trade and commerce a vacuum exists in the African continent which, if filled, may have a substantial impact in terms of African economic cohesion and cooperation, as well as attracting trade and investment from foreign parties. Regardless of the economics, other benefits may accrue to African

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<sup>4</sup> Keohane et al., *supra* note 1, at 457 (“States . . . control access to dispute resolution tribunals or courts”); CHOW & SCHOENBAUM, *supra* note 3 (“[T]hese alternative methods must be chosen by agreement of the parties”).

<sup>5</sup> CHOW & SCHOENBAUM, *supra* note 3; Keohane et al., *supra* note 1, at 457 n.1.

<sup>6</sup> Keohane et al., *supra* note 1, at 457 n.1; *see also generally* David Held, *The Changing Structure of International Law: Sovereignty Transformed?*, in THE GLOBAL TRANSFORMATIONS READER 162 (David Held & Anthony McGrew eds., 2d ed. 2003).

<sup>7</sup> Keohane et al., *supra* note 1, at 457 n.1.

<sup>8</sup> *International Dispute Settlement*, *supra* note 3. Cf. August Reinisch, *The Proliferation of International Dispute Settlement Mechanisms: The Threat of Fragmentation vs. the Promise of a More Effective System? Some Reflections From the Perspective of Investment Arbitration*, in INTERNATIONAL LAW BETWEEN UNIVERSALISM AND FRAGMENTATION - Festschrift in Honour of Gerhard Hafner 107 (Isabelle Buffard, James Crawford, Alain Pellet, I. Buffard & Stephan Wittich eds. 2008) (“For more than a decade, international lawyers and international relations scholars have been fascinated by an ever-increasing number of international courts and tribunals.”).

nations in the arenas of interstate conflict, electoral disputes, and governance concerns.

This paper will assess the normative approach to international dispute settlement provided by alternative transnational and supranational dispute resolution mechanisms, as well as briefly (and more descriptively) survey such existing mechanisms. Section II will describe the modern norms of incorporating ADR processes into transnational dispute resolution. Section III will assess existing international mechanisms for dispute resolution. Section IV will descriptively analyze African efforts and interests in establishing dispute resolution mechanisms. This analysis will focus on the stated goals of the New Economic Partnership for African Development (NEPAD) and the African Union (AU), and their subsequent efforts to achieve these goals. Indeed, subsequent normative analysis must be made of the pros and cons of such dispute resolution mechanisms in the African context, and as such the legitimacy of NEPAD and the AU will form a significant talking point. Having described the problem itself, Section IV will conclude with a number of arguments in favor of a new African transnational dispute resolution body that incorporates ADR themes into its processes. Finally, Section V will describe the basic means of implementing such dispute resolution mechanisms.

## II. THE ROLE OF ADR MECHANISMS

Alternative dispute resolution (ADR) is a field of study and practice that seeks to resolve disputes between entities without resorting to traditional court-based litigation.<sup>9</sup> ADR is continually evolving and growing, typically (if not exclusively) involving one or a combination of three primary mechanisms of dispute resolution: negotiation, mediation, and arbitration.<sup>10</sup> A rapidly emerging if not firmly established avenue of dispute settlement for individuals in the domestic setting, ADR mechanisms have come to dominate the international arena.<sup>11</sup> Indeed, even outside of the international arena, "there is now increasing recognition of the fact that every type of dispute can

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<sup>9</sup> Karl J. Mackie, *Dispute Resolution: The New Wave*, in A HANDBOOK OF DISPUTE RESOLUTION (Karl J. Mackie ed., 1999). Entities can include individuals, corporations, or states, to name but a few possibilities.

<sup>10</sup> ALBERT FIADJOE, *ALTERNATIVE DISPUTE RESOLUTION: A DEVELOPING WORLD PERSPECTIVE* 1 (2004).

<sup>11</sup> See *supra* notes 1–8 and accompanying text.

be the subject of a dispute resolution process . . . [and] ADR is becoming the preferred choice for the resolution of conflict and disagreement.”<sup>12</sup>

ADR can at times provide a far superior mode of dispute resolution to traditional litigation, as it is based on a philosophy of “co-operative problem-solving”—indeed it is typically tailored to the needs of the parties, *by* the parties themselves.<sup>13</sup> The reasons for this include ADR’s capacity to impact people’s “standards of behaviour”; to both rely on and entrench “interpersonal and community ties that are . . . meaningful to parties”; to look towards resolving ongoing conflict and prevent *future* antagonism; and the idea that ADR can “create and maintain mutual respect, commitment, civility and creativity.”<sup>14</sup>

Indeed, these plaudits ring particularly true at the international level, where ADR dominates the field of international dispute resolution.<sup>15</sup> While there remains some (albeit little) debate as to the true value that ADR processes offer at the domestic, individual level (as compared to the litigation process), there is little doubt that ADR is the more attractive option for *nations* to pursue in settling their differences.<sup>16</sup> This is due to a number of reasons: (1) nation-states’ reluctance to put their fate in the hands of “third parties”; (2) the fact that adjudicatory procedures (and certainly litigious procedures) are zero-sum (one party wins, the other loses); (3) the realization by nation-state actors that a litigious or adjudicative procedure is unlikely to resolve the underlying nature of the dispute; (4) wariness of litigation due to its susceptibility to be used as a negotiation or diplomatic “tactic”; and (5) nation-states’ general lack of interest in establishing international law (or precedent).<sup>17</sup> It is worth mentioning, too, that legal action against nation-states may run into difficulty on certain issues due to the notion of foreign

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<sup>12</sup> FIADJOE, *supra* note 10, at 1.

<sup>13</sup> Tony F. Marshall, *Neighbour Disputes: Community Mediation Schemes as an Alternative to Litigation*, in A HANDBOOK OF DISPUTE RESOLUTION, *supra* note 9, at 65, 66–67.

<sup>14</sup> *Id.* at 67.

<sup>15</sup> CHOW & SCHOENBAUM, *supra* note 3; MARTIN DIXON, INTERNATIONAL LAW 280–81 (2007).

<sup>16</sup> See generally Richard B. Bilder, *Some Limitations of Adjudication as an International Dispute Settlement Technique*, 23 VA. J. INT’L L. 3 (1982). For a discussion of the merits of litigation versus ADR processes, see Edward Brunet, *Questioning the Quality of Alternate Dispute Resolution*, 62 TUL. L. REV. 1 (1987).

<sup>17</sup> Bilder, *supra* note 16, at 3–5.

## CAN THE LEOPARD CHANGE ITS SPOTS?

sovereign immunity.<sup>18</sup> This *can* make legal action against states very difficult through the traditional, national court litigation system.<sup>19</sup> ADR is thus extremely attractive to nation-states in their various approaches to resolving conflict and disputes amongst and between one another.

### III. INTERNATIONAL DISPUTE RESOLUTION MECHANISMS

A number of international dispute mechanisms exist, which provide an indication of existing norms with regards to, as well as extent of emphasis placed on, dispute resolution mechanisms in the international arena during the era of globalization.<sup>20</sup> A brief background is necessary to understand these institutional mechanisms' role and location in the international landscape, as well as the emphasis that is currently placed on ADR in international dispute resolution. This section will thereafter survey a number of these institutional mechanisms and examine their roles more precisely, as well as explore their varying proclivities towards ADR.

#### A. Background

As noted above, international dispute resolution mechanisms dot the landscape of international law in multiple arenas.<sup>21</sup> The fundamental aim of such mechanisms is always to resolve disputes; a dispute between nations (i.e. an international dispute) is described under one definition as a "disagreement on a point of law or fact, a conflict of legal views or of interests between two states . . . [and] relate[s] to an alleged breach of one or more legal duties."<sup>22</sup> An alternative definition is that "an international dispute can be said to exist whenever . . . a disagreement involves governments, institutions, juristic person (corporation) or private individuals in different parts of the world."<sup>23</sup>

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<sup>18</sup> IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 323 (2008) ("[M]any national courts will refuse to exercise jurisdiction in cases involving foreign acts of state.").

<sup>19</sup> For a detailed discussion of this issue, see *id.* at 323–48.

<sup>20</sup> See *supra* notes 1–8.

<sup>21</sup> DIXON, *supra* note 15.

<sup>22</sup> Ian Brownlie, *The Peaceful Settlement of International Disputes*, 8 CHINESE J. INT'L L. 267, 268 (2009).

<sup>23</sup> J.G. MERRILLS, *INTERNATIONAL DISPUTE SETTLEMENT* 1 (2011).

Various processes can be used to resolve these disputes. Negotiation is typically the starting point, and is usually conducted directly by the parties, occasionally with reference to certain legal or political criteria.<sup>24</sup> Mediation,<sup>25</sup> conciliation,<sup>26</sup> ombudsmen,<sup>27</sup> and commissions of inquiry<sup>28</sup> are other forms of ADR that are commonly used to resolve international disputes.<sup>29</sup> After negotiation, the largest form of ADR in the international

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<sup>24</sup> See *id.*; see also Brownlie, *supra* note 22, at 270; Richard Bilder, *An Overview of International Dispute Settlement*, 1 EMORY J. INT'L DIS. RES. 1, 22 (1986) ("Negotiation is a process whereby the parties directly communicate and bargain with each other in an attempt to agree on a settlement of the issue. By choosing to use this technique, the parties retain maximum control of the process and outcome. Negotiation is clearly the predominant, usual and preferred method of resolving international disputes.").

<sup>25</sup> Mediation involves a third party "facilitating communication" between parties, and typically assisting in the negotiations. Bilder, *supra* note 24, at 24 ("[T]he mediator usually plays a[n] . . . active part in facilitating communications and negotiations between the parties, and is sometimes permitted or expected to advance informal and nonbinding proposals of his or her own.") In certain contexts, particularly mediations conducted by the Secretary-General of the United Nations, a technique akin to mediation, known as "good offices," may be used. Bilder, *id.* ("Good offices and mediation are techniques in which the parties, unable to resolve a dispute by negotiation, request or agree to limited intervention by a third party to help them break the impasse.").

<sup>26</sup> Conciliation is similar to mediation, although typically conciliation will involve a heightened emphasis on fact-finding. DICTIONARY OF CONFLICT RESOLUTION 106-07 (Douglas H. Yarn ed., 1999) ("[C]onciliation has two basic functions: to investigate and clarify the facts in dispute, and to attempt to bring the parties into agreement by suggesting mutually acceptable solutions to the problem.").

<sup>27</sup> Ombudsmen can play different roles, but they are typically intended to "deal[] with complains from the public regarding decisions, actions, or omissions of public administration." *About the IOI*, INT'L OMBUDSMAN INST., <http://www.theioi.org/the-i-o-i/about-the-ioi> (last visited May 25, 2014) ("The role of the ombudsman is to protect the people against violation of rights, abuse of powers, error, negligence, unfair decisions and maladministration and to improve public administration while making the government's actions more open and its administration more accountable to the public."). Ombudsmen can also be employed by entities such as governments and private corporations in order to resolve a large number of disputes swiftly and efficiently, such as Kenneth Feinberg in the BP Oil Spill and the 9/11 terrorist attacks. See, for e.g., Terry Carter, *The Master of Disasters: Is it Just Him, or is Kenneth Feinberg Changing the Court of Mass Tort Resolution?*, 97 A.B.A. J. 33 (2011). The use of ombudsmen need not be limited to domestic disputes, but can be extended to settlement of international disputes.

<sup>28</sup> Commissions of inquiry are focused on fact-finding rather than rules of law, in order to contribute to the settlement of certain disputes. See generally S.M.G. KOOPMANS, DIPLOMATIC DISPUTE SETTLEMENT 1-3 (2008).

<sup>29</sup> Brownlie, *supra* note 22, at 271-72; MERRILLS, *supra* note 23, at 26-79.

## CAN THE LEOPARD CHANGE ITS SPOTS?

sphere is undoubtedly arbitration, which is akin to litigation in that arbitrators do cast binding judgments on the parties.<sup>30</sup> However, arbitration differs tremendously in that the parties have the opportunity to dictate the terms of the arbitral process, even to the point of selecting their arbitrator/adjudicator themselves.<sup>31</sup> Indeed, arbitration is extremely popular in international dispute resolution and “provides a major element in the pattern of methods of peaceful settlement.”<sup>32</sup> Furthermore, the New York Convention<sup>33</sup> has ensured that arbitral awards are not only enforceable in all countries that are signatories to the Convention, but that “enforcing a foreign arbitration award is much easier than forcing a foreign judgment.”<sup>34</sup>

### B. *The Role of International Agreements and Organizations*

Outside of the general processes of arbitration, mediation, and negotiation, there are a number of institutionalized dispute resolution mechanisms that function in international law. The International Court of Justice (ICJ) is a more judicially-based mechanism run under the auspices of the United Nations; however, it also incorporates elements of ADR in its approach.<sup>35</sup> For instance, “[s]tates not bound by the system of compulsory jurisdiction may agree to resort to the Court [and] . . . the Court has a jurisdiction of an advisory character.”<sup>36</sup> In one sense, the ICJ is not judicial at all, since the powers of the ICJ can be extremely limited by national courts’ unwillingness to effectuate judgments of the ICJ.<sup>37</sup> In this sense, the ICJ’s

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<sup>30</sup> See MARY ELLEN O’CONNELL, *INTERNATIONAL DISPUTE RESOLUTION: CASES AND MATERIALS* 105–07 (2d ed. 2012).

<sup>31</sup> See Alan S. Rau & Edward F. Sherman, *Tradition and Innovation in International Arbitration Procedure*, 30 TEX. INT’L L.J. 89 (1995).

<sup>32</sup> Brownlie, *supra* note 22, at 277; see also CHOW & SCHOENBAUM, *supra* note 3, at 619.

<sup>33</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Jun. 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38.

<sup>34</sup> CHOW & SCHOENBAUM, *supra* note 3, at 644.

<sup>35</sup> Brownlie, *supra* note 22, at 277–81; see also MERRILLS, *supra* note 23, at 116–41.

<sup>36</sup> Brownlie, *supra* note 22, at 277; see also MERRILLS, *supra* note 23, at 142–161.

<sup>37</sup> See, e.g., *Medellin v. Texas*, 552 U.S. 491 (2008). U.N. Charter Article 94 requires that signatory member-nations shall “undertake to comply” with ICJ decisions. U.N. Charter art. 94. The U.S. Supreme Court found this language to indicate a non-self-executing treaty, since Article 94 “does not provide that the United States ‘shall’ or ‘must’ comply with an ICJ decision.” *Medellin*, 552 U.S. at 508. In short, the ICJ’s

capacity to effectively resolve disputes involving nation-states as parties is tenuous at best. Thus, even when international dispute mechanisms are structured as juridical court-based systems, liberties are taken that demonstrate a tendency towards ADR methods and approaches.

An exception to this rule is the International Criminal Court (ICC). The ICC embodies a particularly trial-based approach.<sup>38</sup> Of especial interest to the African continent is the fact that the Rome Statute establishing the ICC was the first written normative instrument potentially of a universal character which qualifies serious violations of humanitarian law in internal conflicts as war crimes, and the first that provides a mechanism for their prosecution at the international level.<sup>39</sup> This would have a tremendous impact for a number of African states over the first decade of the twenty-first century.<sup>40</sup> Just as the ICC was born out of the Rome Statute—an international agreement—so do many international dispute settlement mechanisms in the realm of trade and commerce exist as a function of an international agreement. For instance the International Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention)<sup>41</sup> resulted in the creation of the World Bank's International Centre for Settlement of Investment Disputes (ICSID).<sup>42</sup> ICSID provides for independent arbitration of international investment disputes, and compulsory resort to ICSID may be provided for in individual Bilateral Investment Treaties.<sup>43</sup> The World Trade

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decisions should be viewed by U.S. courts as non-binding guidelines—the U.S. Congress has the option to create legislation effectuating the ICJ decisions.

<sup>38</sup> WILLIAM A. SCHABAS, *AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT* 206–342 (4th ed. 2011).

<sup>39</sup> Luigi Condorelli, *War Crimes and Internal Conflicts in the Statute of the International Criminal Court*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A CHALLENGE TO IMPUNITY* 107, 112 (Mauro Politi & Giuseppe Nesi eds., 2001).

<sup>40</sup> See Olympia Bekou & Sangeeta Shah, *Realising the Potential of the International Criminal Court: The African Experience*, 6 HUM. RTS L. REV. 499, 499 (2006) (“[E]fforts of the International Criminal Court (ICC) to eradicate impunity for international crimes have been focused in the African region . . . [and] despite their willingness to make use of the ICC system for prosecutions, African States . . . have made very little progress in implementing the Rome Statute.”).

<sup>41</sup> Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, opened for signature Mar. 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159, (entered into force Oct. 14, 1966), reprinted in 4 I.L.M. 532 (1965).

<sup>42</sup> LUCY REED, JAN PAULSSON & NIGEL BLACKABY, *GUIDE TO ICSID ARBITRATION* 1 (2004).

<sup>43</sup> *Id.* at 41.



Organization (WTO) also maintains a fulltime Dispute Settlement Mechanism (DSM) designed to hear complaints between signatory member states.<sup>44</sup> Indeed, “an agreement that specified a set of rules constraining the conduct of its signatories would be expected to have, *as in any rule-based system*, a mechanism of enforcement of the rules and a means for settlement of disputes about alleged violation of rules.”<sup>45</sup>

Similarly to the WTO DSM, many other trade agreements also provide for some form of formal dispute resolution mechanism, based on the same logic as espoused above.<sup>46</sup> It is indeed this logic that drives the creation of any international dispute settlement mechanism and in Africa these mechanisms are apparent by their very absence.

#### IV. DISPUTE RESOLUTION MECHANISMS IN AFRICA

This section will describe in some detail the existing mechanisms within Africa that fulfill a transnational dispute resolution role. The status quo is far from encouraging, but there are signs of light, primarily in the form of certain regional bodies that have created dispute resolution mechanisms in the absence of a continental mechanism. The section thus opens by examining these existing mechanisms, with special emphasis on the African Union’s (failed) efforts to create a continental mechanism. Thereafter, the section will discuss the background and intended role of such mechanisms in the African context. Special mention must be made of the African integrationist project, and the relative failure of African nations to achieve their goals in this regard. This is most illuminating in light of their inability to create an effective medium for resolution of disputes. Finally, the section will examine the various arguments in favor of the establishment of such a dispute resolution body. The most prominent of these arguments is that the integrationist project requires some kind of enforcement device or body for the settlement of disputes in order to engender a sense of legitimacy in an otherwise toothless institution and project. Additionally, the very laudable

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<sup>44</sup> See generally T. N. Srinivasan, *The Dispute Settlement Mechanism of the WTO: A Brief History and an Evaluation from Economic, Contractarian and Legal Perspectives*, 30 WORLD ECON. 1033 (2007).

<sup>45</sup> *Id.* at 1033–34 (emphasis added).

<sup>46</sup> See, e.g., Ljiljana Biukovic, *Dispute Resolution Mechanisms and Regional Trade Agreements: South American and Caribbean Modalities*, 14 U.C. DAVIS J. INT’L L. AND POLICY 255 (2008) (looking at dispute resolution mechanisms in the Central American Common Market, the Andean Community, the Caribbean Community and Common Market, and the Southern Common Market).

aims of the International Criminal Court must be measured against its apparent loss of legitimacy within Africa. In the absence of African nations' support for the Court, there is no body responsible for dispensing international criminal justice within the African continent, at least no body that is endorsed by both African leaders and their governments, as well as the people of Africa themselves. This presents a strong reason for African nations to take upon themselves the role of dispensing justice, while doing it in a manner conducive to the peaceful resolution of disputes—thus taking into account African political realities. Thirdly, the failure of existing mechanisms will be examined in two parts: firstly, that such mechanisms have been created in the past is testament to a legitimate desire and need for such mechanisms; and secondly, that these bodies have failed in their aims demonstrates that a new approach is required.

### A. *The Status Quo*

As distinguished above in Section III, dispute resolution mechanisms can exist on two different dimensions: the domestic (or local) level, and the international level. This paper is primarily focused on the international level; however, it is interesting to note that alternative dispute resolution mechanisms have existed in African traditional societies for generations.<sup>47</sup> Where national governments have implemented domestic ADR procedures, such procedures have been largely successful.<sup>48</sup> This success is attributed partly to ADR's ability to "bridge the gap between the formal legal system and traditional modes of African justice."<sup>49</sup> Those describing ADR's success in Africa note its potential for "stabilization and statebuilding," and there are persistent calls for increased application of ADR in African society.<sup>50</sup> This should indicate the potential for ADR to play a larger role in facilitating successful *and* efficient settlement of disputes in the African context.

In this respect, however, dispute settlement mechanisms are in fact notable by their absence. In the field of security, in 1996, southern African

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<sup>47</sup> Ernest E. Uwazie, *Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability*, 16 AFR. SEC. BRIEF 1, 3 (November 2011), available at [http://www.csus.edu/hhs/pdfs/AfricaBriefFinal\\_16.pdf](http://www.csus.edu/hhs/pdfs/AfricaBriefFinal_16.pdf); see also FIADJOE, *supra* note 10, at 2, 4–5 ("Societies in Africa . . . were practicing non-litigious means of dispute resolution long before the advent of the nation state.").

<sup>48</sup> Uwazie, *supra* note 47, at 4–5.

<sup>49</sup> *Id.* at 4.

<sup>50</sup> *Id.* at 4–5.

countries created the “little-known” Association of Southern African States (ASAS) which was intended to ensure the security of its member states.<sup>51</sup> However, to this day, “ASAS has yet to create the appropriate organs for dealing formally with conflicts in the region.”<sup>52</sup> This is a trend that has been followed widely: the creation of supranational organizations with heady goals that unfortunately fail to implement a suitable supranational dispute settlement mechanism. For instance, the Southern African Customs Union Agreement provides for “policies and instruments to address unfair trade practices between Member States.”<sup>53</sup> Yet, such “policies and instruments have not been finalized and [disputes] still need to be addressed on an *ad hoc* basis.”<sup>54</sup> Furthermore, and perhaps even more maddeningly, while the treaty did ostensibly provide for the creation of an *ad hoc* tribunal that would have jurisdiction not only “over trade disputes between States, but also disputes relating to other inter-State matters as well as disputes between natural or legal persons and States,” no such tribunal has ever materialized, and “all disputes have been resolved bilaterally.”<sup>55</sup>

There are exceptions to this rule, such as the Economic Community of West African States (ECOWAS) Conflict Prevention Framework, which in its very wording appears to embody the heart and soul of dispute resolution.<sup>56</sup> The Framework explains that “conflict is the motor of transformation and is either positive or negative. It can be creatively transformed to ensure equity, progress and harmony; or destructively transformed to engender acute insecurity.”<sup>57</sup> The ECOWAS Framework builds upon its predecessor, the Protocol Relating to the Mechanism for

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<sup>51</sup> A. Essuman-Johnson, *Regional Conflict Resolution Mechanisms: A Comparative Analysis of Two African Security Complexes*, 3 AFR. J. POL. SCI. INT’L REL. 409, 412 (2009).

<sup>52</sup> *Id.*

<sup>53</sup> Southern African Customs Union Agreement art. 41, Oct. 21, 2002, WIPO Lex No. TRT/SACU/001, available at [http://www.wipo.int/wipolex/en/treaties/text.jsp?file\\_id=229898](http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=229898).

<sup>54</sup> GUSTAV BRINK, INTERNATIONAL TRADE DISPUTE RESOLUTION: LESSONS FROM SOUTH AFRICA ICTSD DISPUTE SETTLEMENT AND LEGAL ASPECTS OF INTERNATIONAL TRADE 24 (2007).

<sup>55</sup> *Id.*

<sup>56</sup> Econ. Cmty. of W. African States [ECOWAS], *The ECOWAS Conflict Prevention Framework*, Reg. MSC/REG.1/01/08 (Jan. 16, 2008), available at [http://www.ecowas.int/publications/en/framework/ECPF\\_final.pdf](http://www.ecowas.int/publications/en/framework/ECPF_final.pdf).

<sup>57</sup> *Id.* at 7.

Conflict Prevention, Management, Resolution, Peacekeeping and Security,<sup>58</sup> and provides a set of guidelines for ECOWAS's other "conflict prevention organs," including the Early Warning System, the Mediation and Security Council, Offices of the Special Representative, and the Council of the Wise and Special Mediators.<sup>59</sup> All of these "organs" could be classified under the heading of ADR. Furthermore, the ECOWAS vision for their dispute settlement system makes clear that "tensions between sovereignty and supranationality, and between regime security and human security, shall be progressively resolved in favour of supranationality and human security."<sup>60</sup> As will be shown, this is exactly the sort of institutionalized dispute settlement framework that African integration is largely missing.<sup>61</sup>

In 1993, the Organization of African Unity<sup>62</sup> (OAU) (the forerunner of the present-day African Union) formed a Mechanism for Conflict Prevention, Management and Resolution, which was set up to anticipate and prevent conflict in Africa.<sup>63</sup> Just as the OAU would be replaced with the African Union,<sup>64</sup> the Mechanism would ultimately be replaced by the African Union

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<sup>58</sup> ECOWAS, *PROTOCOL RELATING TO THE MECHANISM FOR CONFLICT PREVENTION, MANAGEMENT, RESOLUTION, PEACEKEEPING AND SECURITY* (1999), *available at* <http://www.comm.ecowas.int/sec/index.php?id=ap101299&lang=en>.

<sup>59</sup> ECOWAS, *supra* note 58, at 6. Interestingly, many of these mechanisms have also been instituted by the African Union. *See* ABOU JENG, *PEACEBUILDING IN THE AFRICAN UNION* 175 (2012).

<sup>60</sup> ECOWAS, *supra* note 58, at 6.

<sup>61</sup> ECOWAS emphasizes democratic principles in the way in which they implement actions, which may have contributed to its relative success. Herbert Wulf & Tobias Debiel, *Conflict Early Warning and Response Mechanisms: Tools for Enhancing the Effectiveness of Regional Organisations? A Comparative Study of the AU, ECOWAS, IGAD, ASEAN/ARF and PIF*, at 17 (Crisis States Res. Ctr., Crisis States Working Papers Series No. 2, Working Paper No. 49, 2009). ECOWAS' major downfall, however, has been the "limited operational resources at its disposal." *Id.* This is worth noting as one considers a future African Union initiative along similar lines to the ECOWAS project.

<sup>62</sup> For a discussion of the evolution of African continental organizations, see Mohammed Bedjaoui, *Brief Historical Overview of Steps to African Unity*, in *THE AFRICAN UNION: LEGAL AND INSTITUTIONAL FRAMEWORK: A MANUAL ON THE PAN-AFRICAN ORGANIZATION* 9 (Abdulgawi A. Yusuf & Fatsah Ouguerouz eds., 2012).

<sup>63</sup> FRANS VILJOEN, *INTERNATIONAL HUMAN RIGHTS LAW IN AFRICA* 289, 410 (2d ed. 2012).

<sup>64</sup> Bedjaoui, *supra* note 62, at 20.

## CAN THE LEOPARD CHANGE ITS SPOTS?

Peace and Security Council (PSC).<sup>65</sup> The PSC consists of a number of separate institutions, "some of [which] have not yet been made fully functional."<sup>66</sup> The PSC is a self-contradictory body, requiring on the one hand that "members [of the AU] must designate part of their military force to be on 'standby' to join PSC peace missions," while at the same time adhering strictly to the principles of "respect for territorial integrity, non-interference in the domestic affairs of states, and respect for borders achieved at independence."<sup>67</sup> Additionally, the AU created the African Peer Review Mechanism (APRM), which consists of a "voluntary process of submission to review by 'peers' (fellow heads of state) of a country's record in political, economic, and corporate governance."<sup>68</sup> This process is "aimed at a 'constructive dialogue' between equals, and derives from the self-imposed commitment of states to take 'national ownership' of a rigorous process of self-assessment."<sup>69</sup> While the APRM has been successful at "forestalling" events in certain countries, it has not been able to effectively prevent those events.<sup>70</sup>

Two other forms of supranational quasi-judicial body that Africa has adopted are the African Court on Human and Peoples' Rights (ACHPR), and the African Commission on Human and Peoples' Rights, which ostensibly work closely together.<sup>71</sup> Both of these bodies spring from the African Charter on Human and Peoples' Rights (African Charter), which was adopted in 1981 and entered into force in 1986.<sup>72</sup> The Commission's role is "deliberately . . . minimalist" and is primarily aimed at monitoring AU member states' human rights performance.<sup>73</sup> Unfortunately, the Commission is severely underfunded, understaffed, and to put it succinctly "has clearly been designed to accomplish very little."<sup>74</sup> The ACHPR was initially intended to operate in tandem with a partner court, the stillborn African

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<sup>65</sup> Roland Adjovi, *The Peace and Security Council*, in *THE AFRICAN UNION: LEGAL AND INSTITUTIONAL FRAMEWORK: A MANUAL ON THE PAN-AFRICAN ORGANIZATION*, *supra* note 62, at 143.

<sup>66</sup> VILJOEN, *supra* note 63, at 193.

<sup>67</sup> *Id.* at 194–95 (citing to PSC Protocol, art. 2 (e), (f), (g), (i)).

<sup>68</sup> VILJOEN, *supra* note 63, at 198.

<sup>69</sup> *Id.* at 199.

<sup>70</sup> *Id.* at 203–04.

<sup>71</sup> *Id.* at 410–11.

<sup>72</sup> *Id.* at 289, 411.

<sup>73</sup> *Id.* at 289.

<sup>74</sup> VILJOEN, *supra* note 63, at 293–94.

Union Court of Justice.<sup>75</sup> The Court of Justice was intended to resolve “disputes about the common policies of the AU, and issues arising from accelerated political and socioeconomic integration.”<sup>76</sup> This body would later be legislatively collapsed into the ACHPR—however the incorporation of its jurisdiction has never actually taken place.<sup>77</sup>

The AU dual-court system was originally envisaged along the European Union’s dual-court approach (a Court of Justice dealing with socio-economic matters, and a Human Rights Court for violations of human rights),<sup>78</sup> and when drafting the Protocol for the [African Union’s] Court of Justice, merger was “considered but rejected.”<sup>79</sup> In the absence of any debate, the AU Assembly subsequently mandated the merger of the two institutions, based ostensibly on a lack of funding for two separate Courts.<sup>80</sup> The combined Court was intended to have sweeping jurisdiction (or “competence”) over:

[A]ll disputes that pertain to the interpretation and application of the AU Constitutive Act, the interpretation and application or validity of all treaties and legal instruments adopted and ratified under the auspices of the AU, ‘all acts, decisions, regulations and directives of the organs of the Union,’ and ‘the nature or extent of the reparation to be made for the breach of an international obligation.’ The Court has the power to make binding decisions on member States. Failure to comply with the judgment of the Court may attract sanctions from the AU Assembly.<sup>81</sup>

This Court does not exist. In the six odd years from the adoption of the Protocol to the writing of this paper, this contemplated judicial body with sweeping jurisdiction has simply failed to materialize. What has ensued has

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<sup>75</sup> *Id.* at 205.

<sup>76</sup> *Id.* (citing to African Union Constitutive Act, art 3, art 9(1)(a)).

<sup>77</sup> VILJOEN, *supra* note 63, at 205.

<sup>78</sup> JOHN FAIRHURST, *LAW OF THE EUROPEAN UNION* 151 (2010).

<sup>79</sup> VILJOEN, *supra* note 63, at 448–49.

<sup>80</sup> *Id.* at 449; *see also* Fatsah Ouguergouz, *The African Court of Justice and Human Rights*, in *THE AFRICAN UNION: LEGAL AND INSTITUTIONAL FRAMEWORK: A MANUAL ON THE PAN-AFRICAN ORGANIZATION*, *supra* note 62, at 119, 120 (“The decision to merge the two Courts was proposed by the bureau of the Assembly and was based ‘on the need to rationalize the two Courts and to make them efficient and cost effective.’”).

<sup>81</sup> GIRMACHEW ALEMU ANEME, *A STUDY OF THE AFRICAN UNION’S RIGHT OF INTERVENTION AGAINST GENOCIDE, CRIMES AGAINST HUMANITY AND WAR CRIMES* 41 (2011) (citing to AFRICAN UNION, *PROTOCOL ON THE STATUTE OF THE AFRICAN COURT OF JUSTICE AND HUMAN RIGHTS* (2008)).

been a barrage of legislation amending this Protocol.<sup>82</sup> Attempts to amend and channel the Court's legislative basis have resulted in the Court itself not being created at all. To date the only African Union Court in existence is the ACHPR. Considering what is at stake here (and this paper will explain in further detail exactly what *is* at stake here), this lack of action is not so much an oversight as a travesty.

Regardless of its present nonexistence, however, there has also been significant criticism simply of the proposed merger of the two courts. In the words of one prominent author:

The merger of the two Courts is an illustration of the AU conflating the legal-political and economic aspects of integration, and presents a possible scenario in which states party to the AEC [African Economic Community] would *not* be under the jurisdiction of a continental court. As individuals only have standing to bring cases to the [merged] Court on human rights, individuals would be *excluded* from accessing the Court in respect of matters related to economic integration.<sup>83</sup>

Effectively, the AU deprived the continent of a potential judicial body for the settlement of individual as well as national disputes, outside the rather narrow context of human rights. At the time the African Commission itself expressed its concern at the 'negative impact' that the decision could have on the establishment of an effective African Court on Human and Peoples' Rights, drawing attention to the different mandates and litigants of the two courts.<sup>84</sup>

Finally, even within its narrow context, the *existing* Court on Human and Peoples' Rights suffers from significant criticisms.<sup>85</sup> As of 2012, "only about half of the AU member states have accepted the Court Protocol and only five have agreed to allow direct individual access to the Court."<sup>86</sup>

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<sup>82</sup> Frans Viljoen, *AU Assembly Should Consider Human Rights Implications Before Adopting the Amending Merged African Court Protocol*, AFRICLAW (May 23, 2012), <http://africlaw.com/2012/05/23/au-assembly-should-consider-human-rights-implications-before-adopting-the-amending-merged-african-court-protocol/#more-213>.

<sup>83</sup> VILJOEN, *supra* note 63, at 449; (emphasis added); see also Richard Frimpong Oppong, *The African Union, the African Economic Community and Africa's Regional Economic Communities: Untangling a Complex Web*, 18 AFRICAN J. INT'L COMP. L. 92, 100–03 (2010). For more on the African Economic Community, see *infra* Section IV.B.

<sup>84</sup> ADEMOLA ABASS, PROTECTING HUMAN SECURITY IN AFRICA 289 (2010).

<sup>85</sup> *Id.* at 290.

<sup>86</sup> VILJOEN, *supra* note 63, at 456.

Notwithstanding the unwillingness of member states to permit individual and nongovernmental access to the Court,

The efficacy of the Court and the attainment of the objectives assigned to it will ultimately depend not only on endogenous factors but also on exogenous [factors] such as the provision by the African Union of sufficient financial means enabling the Court to cope with its broad jurisdiction or the readiness of African States to bring cases to the Court rather than to the International Court of Justice for example.<sup>87</sup>

In short, while many commentators applaud the Court's existing human rights mandate,<sup>88</sup> in terms of the broader African picture, there are alarming indications stemming from the collapse of the African Court of Justice into a purely Human Rights Court, *even if* the jurisdiction of the Court includes "constitutional issues relating to the African Union . . . [and] jurisdiction to deal with any issues of international law."<sup>89</sup> The reason for this is predominantly that the new Court fails to incorporate the economic integrationist aims of African transnationalism which lie at the very heart of the African integrationist project, and which form the most basic goal of transnational dispute resolution mechanisms in Africa, as will be discussed below.

### B. *The Intended Goal and the Role of Dispute Resolution Mechanisms in Africa*

Since 1945 African intellectuals have urged:

[F]raternal cooperation between African states [and the] creation of a united Africa based on a federation of sub-regional groups . . . There was a consensus that regional cooperation and unity were crucial if the vast resources of Africa were to be utilized for the prosperity of the continent and its people.<sup>90</sup>

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<sup>87</sup> Ouguergouz, *supra* note 80, at 141.

<sup>88</sup> ABASS, *supra* note 84, at 311 ("[T]he Statute nevertheless constitutes a significant advance towards enhancing the promotion and protection of human rights in Africa").

<sup>89</sup> Ouguergouz, *supra* note 80, at 130–31.

<sup>90</sup> P. Mweti Munya, *The Organization of African Unity and its Role in Regional Conflict Resolution and Dispute Settlement: A Critical Evaluation*, 19 B.C. THIRD WORLD L.J. 537, 541 (1999).



## CAN THE LEOPARD CHANGE ITS SPOTS?

That consensus has not changed to this day.<sup>91</sup> Indeed, “[t]he need to integrate African economies is widely accepted.”<sup>92</sup> To this end the approach taken has been “the division of the continent into regional integration areas that would constitute a united African economy, the African Economic Community [AEC].”<sup>93</sup> Thus a number of regional organizations were born: the Economic Community of West African States (ECOWAS), the Common Market for Eastern and Southern Africa (COMESA), the Economic Community of Central African States (ECCAS), the Arab Maghreb Union (AMU) and the Southern African Customs Union (SACU).<sup>94</sup> These groupings effectively encompass the entire continent.<sup>95</sup> In addition to these groups, some six other economic communities exist.<sup>96</sup>

The key supranational body intended to be responsible for pursuing continental integration, however, was the Organization of African Unity (OAU), formed in 1963, which while “designed as a forum for cooperation,” struggled with the reality that “the majority of African countries were not remotely inclined to give up one iota of sovereignty to a continental organization.”<sup>97</sup> Indeed, the OAU “failed to achieve much in advancing the socio-economic development of the continent or in deepening the unity and

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<sup>91</sup> See, e.g., Richard Frimpong Oppong, *Relational Issues of Law and Economic Integration in Africa: Perspectives from Constitutional, Public and Private International Law*, 2 (Dec. 2009) (unpublished Ph.D dissertation, University of British Columbia) (citing UNITED NATIONS ECONOMIC COMMISSION FOR AFRICA [UNECA], *ASSESSING REGIONAL ECONOMIC INTEGRATION IN AFRICA*, ix (2004), available at [http://eprints.lancs.ac.uk/33295/1/ubc\\_2010\\_spring\\_oppong\\_richard\\_frimpong.pdf](http://eprints.lancs.ac.uk/33295/1/ubc_2010_spring_oppong_richard_frimpong.pdf)).

<sup>92</sup> RICHARD FRIMPONG OPPONG, *LEGAL ASPECTS OF ECONOMIC INTEGRATION IN AFRICA* 7 (2011). See also, e.g., Richard S. Mukisa & Bankole Thompson, *Prerequisites of Economic Integration in Africa*, 42 AFR. TODAY 56, 56 (1995); UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT [UNCTAD], *ECONOMIC DEVELOPMENT IN AFRICA REPORT 2009: STRENGTHENING REGIONAL ECONOMIC INTEGRATION FOR AFRICA'S DEVELOPMENT* 8 (2009) (“Since the independence era, virtually all African countries have embraced regionalism. Today, there are more regional organizations in Africa than in any other continent and most African countries are engaged in more than one regional integration initiative.”).

<sup>93</sup> Trudi Hartzenberg, *Regional Integration in Africa* 5 (World Trade Org. Econ. Research & Statistics Div., Working Paper, 2011).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 5.

<sup>96</sup> UNCTAD, *supra* note 92, at 10.

<sup>97</sup> Bedjaoui, *supra* note 62, at 17.

integration of African peoples.”<sup>98</sup> The OAU would ultimately be replaced in 2000 by the African Union.<sup>99</sup>

The African Union’s Constitutive Act rests on two pillars: “The first is an aspiration which has . . . evolved into . . . the realisation of African unity through a continental organization. The second pillar springs from the realisation that existing organizations have shown their limitations.”<sup>100</sup> The African Union was also accompanied by the creation of the New Economic Partnership for African Development (NEPAD), which aimed to specifically improve socio-economic development in Africa, primarily through increased economic integration. While on the one hand, NEPAD stated the intention of leaders to “enforce the rule of law,” the sole institutional instrument created in order to enforce said rule of law was the African Peer Review Mechanism which, as discussed above, has revealed its shortcomings, and more importantly was originally conceived as a purely *monitory* body with no *true* enforcement capability.<sup>101</sup>

Economic integration has been a key goal of the African cooperative project. One author states that “[t]he imperative of unity on the African continent is so obvious that any case for it would seem superfluous.”<sup>102</sup> It is a given that a common market is a better vehicle for economic growth than individual markets operating independently:

[T]he strength of a nation, and, *a fortiori* [sic], a continent is usually determined by its economy. Many African countries have stories of economic woes to tell. It is in the light of this that the African Economic Treaty is of *paramount* importance given the greater economic co-operation among the countries of Europe and American states.<sup>103</sup>

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<sup>98</sup> Tiyanjana Maluwa, *The Transition from the OAU to the AU*, in THE AFRICAN UNION: LEGAL AND INSTITUTIONAL FRAMEWORK: A MANUAL ON THE PAN-AFRICAN ORGANIZATION, *supra* note 62, at 25, 29–30.

<sup>99</sup> *Id.* at 20.

<sup>100</sup> *Id.*

<sup>101</sup> Edward Kannyo, *The New Partnership for Africa’s Development (NEPAD)*, in THE AFRICAN UNION: LEGAL AND INSTITUTIONAL FRAMEWORK: A MANUAL ON THE PAN-AFRICAN ORGANIZATION, *supra* note 62, at 203, 209.

<sup>102</sup> AKIN OYEBODE, INTERNATIONAL LAW AND POLITICS: AN AFRICAN PERSPECTIVE 221 (2003).

<sup>103</sup> ADEMOLA YAKUBU, HARMONISATION OF LAWS IN AFRICA 62–63 (1999) (emphasis added). For more explanation of the justification for unity in Africa, see OYEBODE, *supra* note 102.

However, the pan-Africanist integration project is not confined to economics, but includes a commitment to human rights enshrined in the African Charter of Human Rights, as well as the African Union's Constitutive Act which "provides extensively for human rights in its Preamble, objectives, and founding principles."<sup>104</sup> Similarly, the AU's partner organization, the New Economic Partnership for African Development, makes reference to human rights in its Declaration.<sup>105</sup> Despite such bodies as the PSC, the APRM, and the Court on Human and Peoples' Rights, both NEPAD and the AU have, with some exceptions, largely failed to monitor and meaningfully impact human rights violations.<sup>106</sup> Furthermore, on the economic front very little fundamental economic integration has occurred.<sup>107</sup> One report explains that "[f]or most of the regional integration schemes, there was almost complete non-implementation of agreed liberalization schedules as well as other obligations by members."<sup>108</sup>

One contributory aspect of this may be a vacuum of enforceability.<sup>109</sup> Indeed, "the absence of legalism at community, regional and national levels is an important problem for Africa's integration."<sup>110</sup> Likewise, where regional bodies *have* created dispute resolution mechanisms, such as the Organization for African Unity's (OAU's) various mechanisms, interference in the internal affairs of member states is prohibited by the African Charter.<sup>111</sup> With hindsight, "[t]he performance of the OAU in conflict resolution can be characterized by modest success in a few cases and dismal failure in most others."<sup>112</sup>

In the absence of a supranational body reinforcing, affirming, interpreting, and enforcing the treaties (including protocols, and "laws") created by supranational bodies such as the AU and NEPAD, individual

<sup>104</sup> VILJOEN, *supra* note 63, at 164.

<sup>105</sup> *Id.* at 167.

<sup>106</sup> *Id.* at 169. *See also id.* at 195–96 ("It is a cause for regret that the African mechanism needed to be prodded into action on a matter of grave concern to the continent"); *id.* at 198 (the AU Mission in Sudan has "to *some* extent contributed to 'further the cause of peace, security and stability' in Darfur") (emphasis added); *id.* at 296 ("the Commission has failed to deal effectively with complaints").

<sup>107</sup> MIROSLAV N. JOVANOVIĆ, *THE ECONOMICS OF INTERNATIONAL INTEGRATION* 702–09 (2006).

<sup>108</sup> UNCTAD, *supra* note 92, at 15.

<sup>109</sup> *See generally* OPPONG, *supra* note 92.

<sup>110</sup> *Id.* at 115.

<sup>111</sup> Munya, *supra* note 90, at 578.

<sup>112</sup> *Id.*

nations have an incentive to preemptively breach the terms of the treaties in the expectation that other countries will also breach the terms of the treaties. There is little to no way out of an African Prisoner's Dilemma. In other words, if all countries upheld the terms of their agreements, and actively pursued integration, the continent would benefit as a whole; indeed, individual countries would benefit. However, in the absence of any judicial (or even quasi-judicial) body enforcing the terms of the agreements, countries fear that when sticking to an agreement, other countries might not do the same. This then creates incentives for all countries to avoid fulfilling their obligations, and the result is the existing state of "complete non-implementation of agreed liberalization schedules as well as other obligations by members."<sup>113</sup> In other words, the absence of an overarching judicial (or even quasi-judicial) body creates a "jurisdictional gap [that] will not aid the uniform application and enforcement of community law within member states . . . [Furthermore, i]t is difficult to conceive of a *stable* and *effective* economic community where community law is not uniformly applicable within and enforceable against member states."<sup>114</sup>

In the absence of a guiding hand from the AU and NEPAD, regional bodies have to some extent filled the void for forming transnational dispute resolution mechanisms. A brief survey of such mechanisms reveals the intentions and goals behind their formation. For instance, the East African Customs Union (Dispute Settlement Understanding) Regulations describe their dispute settlement mechanism's purpose as "to ensure uniformity among Partner States in the implementation of the provisions on dispute settlement and to ensure to the extent possible, that the process is *transparent, accountable, fair, predictable and consistent with the provisions of the Protocol*."<sup>115</sup>

The problem remains, however, that while regional bodies have to some extent filled the void, "[p]ractically no African state's legal regime for the transnationalization of civil justice is worthy of mention . . . It is the exception that African states participate in current international efforts to produce a convention on the subject."<sup>116</sup> This unwillingness to transnationalize justice is the real sticking point, and until African nations

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<sup>113</sup> UNCTAD, *supra* note 92, at 15.

<sup>114</sup> OPPONG, *supra* note 92, at 176 (emphasis added).

<sup>115</sup> E. African Cmty. Customs Union, *Dispute Settlement Mechanism Regulations*, at Reg. 2, Annex XI (emphasis added).

<sup>116</sup> Olusoji O. Elias, *Globalization, 'Law and Development,' and Contemporary Africa*, 2 EUR. J.L. REFORM 259, 271 (2000).

## CAN THE LEOPARD CHANGE ITS SPOTS?

recognize the benefits to such transnationalization, they will be permanently held back from fulfilling their true potential, as explained in further detail below.

### *C. Why should there be an African Dispute Resolution Mechanism?*

There is precedent for the use of ADR in African domestic and traditional society, and today there are calls for increased ADR throughout the continent.<sup>117</sup> It is therefore natural for an African political or economic organization, whose goal is continental integration, to adopt a system for resolution of disputes that incorporates the basic elements of ADR. Furthermore, models for such mechanisms have indeed already been created, in the European Union, in African regional organizations, in trade settlement mechanisms, and elsewhere.<sup>118</sup>

#### *1. Legitimacy and Economics*

There is an aspect of a legal system—a system of accountability—that assumes “collective responsibility for past wrong.”<sup>119</sup> Under such a notion, a society or community can hold members of its number accountable under the legal system, and in this process the law itself becomes legitimized.<sup>120</sup> Indeed,

[a] community of principle, faithful to that promise, can claim the authority of a genuine associative community and can therefore claim moral legitimacy—that its collective decisions are matters of obligation and not bare power—in the name of fraternity . . . [A]ny other form of community, whose officials rejected that commitment would from the outset forfeit any claim to legitimacy under a fraternal ideal.<sup>121</sup>

If the African economic and political experiment embodied in NEPAD and the AU is to have *any* chance of success, they *must* engender a sense of

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<sup>117</sup> Uwazie, *supra* note 47, at 4–5.

<sup>118</sup> See *supra* Part III for a brief description of existing mechanisms that are designed to resolve international disputes, and which incorporate general ADR themes into their procedures.

<sup>119</sup> RONALD DWORKIN, *LAW'S EMPIRE* 173 (1986).

<sup>120</sup> See *generally id.* at 173–216.

<sup>121</sup> *Id.* at 214.

legitimacy amongst their member nations. The rhetoric espoused by academics and politicians regarding the “African renaissance”<sup>122</sup> and a community of African states is little more than a toothless hound in the absence of legitimacy that can be derived on a number of levels; from individuals within member nations, to the member nations themselves.<sup>123</sup>

A critical component required to derive this legitimacy is a system of judicial arbitration or settlement of disputes.<sup>124</sup> In the absence of any form of judiciary or a means of settling disputes, the institutions themselves lack the legitimacy they require.<sup>125</sup> Indeed the process of legitimization through legal resolution is circular—once started, the process leads to further commitment to the principles of law, and thereafter other positive externalities may accrue. Indeed,

A community of principle . . . provides a better defense of political legitimacy than the other models . . . because [such a community of principle] expresses a concern by each for all that is sufficiently special, personal, pervasive, and egalitarian to ground communal obligation according to standards for communal obligation we elsewhere accept.<sup>126</sup>

In other words, by providing a means through which members of a community are able to protect one another (i.e. a system of adjudication or other form of dispute settlement) the community’s obligations (in the form of rules and institutions) gain a legitimacy they would otherwise lack. On a very abstract level, this is precisely why the AU and NEPAD *must* pursue some form of dispute resolution mechanism for its members.

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<sup>122</sup> See, for e.g., Kelvin Kachingwe, *Reflections on the African Renaissance*, DAILY MAIL, <http://www.daily-mail.co.zm/index.php/features/item/3879-reflections-on-the-african-renaissance?tmpl=component&print=1> (last modified May 25, 2014).

<sup>123</sup> MARTIN MEREDITH, *THE STATE OF AFRICA* 677–78 (2006).

<sup>124</sup> OPPONG, *supra* note 92, at 100. See also Fabio Padovano, Grazia Sgarra & Nadia Fiorino, *Judicial Branch, Checks and Balances and Political Accountability*, 14 CONST. POL. ECON. 47, 48 (2003) (“Provided it is independent, the judiciary improves the accountability of democratic systems over and beyond the results obtained in political economics models featuring the executive and the legislature only.”).

<sup>125</sup> See generally Padovano et al., *supra* note 124.

<sup>126</sup> DWORKIN, *supra* note 119, at 216.

## CAN THE LEOPARD CHANGE ITS SPOTS?

This notion is hardly new. The ideas of “separation of powers” and “checks and balances” have been espoused for centuries.<sup>127</sup> Some reference to the so-called “Social Contract” is also relevant in defining this relationship between legitimacy and the rule of law:

The social contract entails a consensual relationship between the state and its institutions and government, and its peoples, in which the latter defer some of their freedoms in return for resources and security provided by the state. The rule of law is integral to this in supporting the rights of peoples, the capacities of states, and the legitimacy of the social contract amongst both.<sup>128</sup>

A related aspect to this legitimacy argument is that enhanced legitimacy can in fact lead to enhanced efficiency. For instance, “[i]t is widely recognized that a system of universal and abstract rules, with *institutions that enforce them*, and predictable mechanisms to regulate conflicts over both the rules and their enforcement, has contributed to the economic success of the Western nation-state.”<sup>129</sup> This logic was indeed explicitly recognized in the earliest stages of the evolution of the European Union (EU), or more specifically its forerunner, the European Economic Community (EEC).<sup>130</sup> A memo sent by the Commission of the EEC in October 1959 noted that

[a] true internal market between the six states will be achieved only if adequate legal protection can be secured . . . As jurisdiction in both civil and commercial matters is derived from the sovereignty of Member States, and since the effect of judicial acts is confined to each national territory, legal protection and, hence, legal certainty in the common market are essentially dependent on the adoption by Member States of a satisfactory

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<sup>127</sup> See THE FEDERALIST NO. 37, at 235 (James Madison) (J. Cooke ed., 1961); CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 213 (D. Carrithers ed., 1977).

<sup>128</sup> Oliver P. Richmond, *The Rule of Law in Liberal Peacebuilding*, in PEACEBUILDING AND RULE OF LAW IN AFRICA: JUST PEACE? 44, 44 (Chandra Lekha Sriram et al. eds., 2011).

<sup>129</sup> Douglas Alan Webb, *Legal System Reform and Private Sector Development in Developing Countries*, in ECONOMIC DEVELOPMENT, FOREIGN INVESTMENT AND THE LAW: ISSUES OF PRIVATE SECTOR INVOLVEMENT, FOREIGN INVESTMENT AND THE RULE OF LAW IN A NEW ERA 45, 47 (Robert Pritchard ed., 1996) (emphasis added).

<sup>130</sup> *Report on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*, COM (1979), 1979 O.J. (C 59/3).

solution to the problems of the recognition and enforcement of judgments.<sup>131</sup>

The EEC ultimately resolved this jurisdictional conundrum through the European Court of Justice, which in the seminal cases of *Van Gend en Loos* (1963)<sup>132</sup> and *Costa v. ENEL* (1964)<sup>133</sup> assumed jurisdiction over a large number of matters, and has subsequently progressively expanded its jurisdiction.<sup>134</sup> Indeed this assumption of jurisdiction is commonly attributed as a hugely significant reason for the EEC's (and subsequently the EU's) success.<sup>135</sup>

Simple harmonization of existing regimes may be insufficient to achieve the level of legal coherence required to create an efficient common market, "especially if various national courts have to interpret[] rules of a Convention the way they deem fit."<sup>136</sup> National courts are extremely unlikely to proactively harmonize laws across borders, voluntarily sacrificing their sovereignty, in the absence of any assurance that the courts of other countries will do the same.<sup>137</sup> Indeed, "[m]ost developing countries view harmonisation of laws as an infringement on their sovereignty."<sup>138</sup> Surpassing this negative attitude is essential, and a supranational dispute settlement mechanism would achieve this if Member nations agreed to be bound by its rulings.

Thus, a system of institutions which *enforces* economic rules is a critical component of economic success, particularly when looking to integrate and harmonize different countries. Such a system is practically nonexistent on the African continent. Referring to this as the "African problem," one author suggests that

Developed societies have the capacity to create, grasp, and rely on a belief system of abstract ideals . . . In developing societies, the subjective, personal element, where loyalties are given not to abstract concepts but to

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<sup>131</sup> *Id.*

<sup>132</sup> Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1.

<sup>133</sup> Case 6/64, *Flaminio Costa v. Ente Nazionale per l'Energia Elettrica*, 1964 E.C.R. 584.

<sup>134</sup> See generally Antoine Vauchez, *The Transnational Politics of Judicialization: Van Gend en Loos and the Making of EU Polity*, 16 EUR. L.J. 1 (2010).

<sup>135</sup> *Id.* at 1–2.

<sup>136</sup> YAKUBU, *supra* note 103, at 38.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 39.



families, patrons, rulers, ethnic or religious identities or leaders, tends to be more prevalent.<sup>139</sup>

In this view, a rule of law that relies on “abstract ideals” is better able to create amenable conditions for trade, commerce, and the efficient functioning of the markets. Where, as in Africa, this reliance is lacking, there is less likelihood of efficiency being maximised.

In short, the argument for institutionalized enforceability is supported by legal legitimacy, political realism, and economic incentive. However, there are further reasons for creating an institution of enforceability, and specifically a mechanism that incorporates elements of ADR.

## 2. *The Criminal Justice Argument*

Africa has been riven by atrocities perpetrated by governments throughout its colonial and post-colonial history.<sup>140</sup> Indeed, this is borne out by the number of times that representatives of African nations have been indicted by the ICC.<sup>141</sup> This disproportionate indictment schedule which has focused on Africa has resulted in a sense of victimization by African governments, if not their peoples.<sup>142</sup> This in turn has resulted in a loss of legitimacy for the ICC, the net result being that while African *people* may support the ICC, their governments have lost interest in supporting the ICC—this is represented by their refusal to arrest and deport indicted individuals, as

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<sup>139</sup> Elias, *supra* note 116, at 266 (quoting RUMU SARKAR, DEVELOPMENT LAW AND INTERNATIONAL FINANCE 7–8 (1999)).

<sup>140</sup> See generally MEREDITH, *supra* note 123.

<sup>141</sup> Lydia Apori Nkansah, *International Criminal Justice in Africa: Some Emerging Dynamics*, 4 J. POL. & L. 74, 76 (2011) (“The ICC’s indictments up to date are only in connection with alleged offences committed by Africans against Africans regarding conflict situations in Uganda, Sudan, Democratic Republic of Congo (DRC) and Central African Republic (CAR) . . . The ICC is currently undertaking investigations into the conflict situation in the Republic of Kenya . . . and the Security Council has requested the ICC to investigate Libya for human rights abuses in the ongoing political upheavals in Libya.”).

<sup>142</sup> Mary Kimani, *Pursuit of Justice or Western Plot?*, AFRICA RENEWAL, Oct. 15, 2009, at 12, available at <http://www.un.org/africarenewal/magazine/october-2009/pursuit-justice-or-western-plot> (77% of Kenyans and 71% of Nigerians approved of the controversial ICC indictment of Omar al-Bashir. In Egypt, an Arab state where one might expect support for al-Bashir, only 52% of those polled *disapproved* of the indictment.).

required by the Rome Statute<sup>143</sup> (to which many, if not all, are signatories).<sup>144</sup> This loss of legitimacy has been heightened by the refusal or inability of the ICC to take action against those states that do refuse to cooperate with the ICC by not handing over indicted individuals. Thus, the lofty ideals of the ICC are wasted as their legitimacy flounders in the African continent, where perhaps more than elsewhere, their goals and aims are exceedingly important in curbing the actions and activities of governments who violently repress their peoples.<sup>145</sup> A large part of the problem facing the ICC has been their refusal to consider the political ramifications of their actions.<sup>146</sup> For instance, in indicting the President of Sudan, Omar al-Bashir, the ICC threatened to and did in fact derail an ongoing negotiation process that sought to bring an end to the violence in Sudan.<sup>147</sup>

Furthermore, notwithstanding the criticisms of the ICC's approach at a simply practical level, there are deeper underlying concerns regarding the role of retributive justice in conflict settings. As one African academic explains:

[I]nternational criminal justice is meshed in politics . . . [R]etributive justice could possibly quell impunity . . . but, it can neither end an ongoing conflict nor be an avenue for national reconciliation . . . [T]he internationalization of justice alienates both the adjudicators and the adjudicating society from the process, thereby denying the process . . . the impetus that it would require for it to benefit the end users or victims of war.<sup>148</sup>

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<sup>143</sup> Göran Sluiter, *Cooperation of States with International Criminal Tribunals*, in THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE 187, 192–97 (Antonio Cassese ed., 2009) (“The . . . legal basis for the duty to cooperate is the Treaty of Rome.”).

<sup>144</sup> *The International Criminal Court: Why Africa Still Needs It*, ECONOMIST, Jun. 3, 2010, at 53, available at <http://www.economist.com/node/16274301> (stating that thirty of Africa's 53 countries have signed up to the ICC, and African nations were instrumental in setting up the ICC); Gysbert Engelbrecht, *The ICC's Role in Africa*, 12 AFR. SEC. REV. 61 (2003), available at <http://www.issafrica.org/pubs/ASR/12No3/E1.html> (stating that at the time of the ICC's inception three of the 18 judges were Africans, and as of 2013 the current Chief Prosecutor is a Gambian, Fatou Bensouda).

<sup>145</sup> See Adolfo Ceretti, *Collective Violence and International Crimes*, in THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE, *supra* note 143, at 5.

<sup>146</sup> JACQUELINE GEIS & ALEX MUNDT, WHEN TO INDICT? THE IMPACT OF TIMING OF INTERNATIONAL CRIMINAL INDICTMENTS ON PEACE PROCESSES AND HUMANITARIAN ACTION (2009) (paper prepared for World Humanitarian Studies Conference).

<sup>147</sup> *Id.*

<sup>148</sup> Nkansah, *supra* note 141, at 81.

## CAN THE LEOPARD CHANGE ITS SPOTS?

Thus, in the realm of supranational criminal justice, African nations have an opportunity to set up a system that is amenable to their particular needs, namely a dispute resolution mechanism that is willing to take into account the political ramifications of its actions, and which actively seeks to incorporate elements of negotiation and mediation into its processes.

The justifications for creation of the ICC have not changed.<sup>149</sup> In any ordinary society when disputes are settled by “fair, impartial, and equitable legal systems, individuals and groups are less likely to resort to self-help and violence to achieve their personal and collective security and well-being.”<sup>150</sup> Derivatively,

It is very difficult to imagine any peace project surviving without the institutions necessary to cement relations between its participants, to provide a future prospect of a long-standing peace, which both defines the rights and limits of the system for its subject and carries with it an aspect of punitive enforcement capacity.<sup>151</sup>

However, as is apparent from its hopeless inadequacy to ensure signatories’ cooperation, the ICC is no longer an instrument capable of fulfilling its goals.<sup>152</sup> Thus, there is a rule-of-law vacuum that an African supranational dispute resolution mechanism could seek to fill, in a proactive way, and thereby perhaps generate the same levels of excitement that abounded in Africa around the time of the Rome Statute’s signing.<sup>153</sup> An ADR-based mechanism would be extremely suitable for achieving this.

The crimes that fall under the ICC’s ambit, including genocide and torture, are such that result in “victims . . . feel[ing that] they no longer belong to the political community: they no longer belong to a state, or a

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<sup>149</sup> See Jeremy Rabkin, *Global Criminal Justice: An Idea Whose Time Has Passed*, 38 CORNELL INT’L L.J. 753, 755 (2005) (“People who suffer the most terrible oppression hope that effective force will come to their rescue.”).

<sup>150</sup> Brian A. Kritz, *The Rule of Law and Peacebuilding*, in INTEGRATED PEACEBUILDING: INNOVATING APPROACHES TO TRANSFORMING CONFLICT 275, 281 (Craig Zelizer ed., 2013).

<sup>151</sup> Richmond, *supra* note 128, at 50–51.

<sup>152</sup> Tanzil-Zaman Chowdhury, *Selective Justice: The ICC and Africa*, AFRICAN OUTLOOK, [http://www.africanoutlookonline.com/index.php?option=com\\_content&view=article&id=2650:selective-justice-the-icc-and-africa&catid=114:letters-to-the-editor&Itemid=617](http://www.africanoutlookonline.com/index.php?option=com_content&view=article&id=2650:selective-justice-the-icc-and-africa&catid=114:letters-to-the-editor&Itemid=617) (last visited Oct. 19, 2013).

<sup>153</sup> *The International Criminal Court: Why Africa Still Needs It*, *supra* note 144, at 53.

territory, or a family.”<sup>154</sup> There is a need to involve communities affected by human rights violations in a process of not simply retribution, but reconciliation.<sup>155</sup> This involvement should not be “a form of disguised formal justice” but should allow “community members to engage in the settlement of problems which have shaken societal foundations.”<sup>156</sup> This could involve mediation or truth and reconciliation commissions.<sup>157</sup> Indeed, mediation could play a significant role in resolving disputes in post-conflict societies.<sup>158</sup> These sorts of approaches are called for in the field of criminal justice, particularly in the African continent.<sup>159</sup>

Rather than pursuing an impersonal, litigation-based approach to justice, ADR techniques feasibly offer superior alternatives, which would recognize the role of the victim in a positive, meaningful way, such that their incorporation into the community would also be considered a goal of the dispute resolution process.<sup>160</sup> As Jose Alvarez notes,

Awareness of the alternatives to international criminal justice and the rationales offered to justify them cast a critical light on the assumptions of some that the ideal forum for mass atrocity is an international court, or that there is only a dichotomous choice between criminal accountability and total amnesia, or that only criminal punishment (i) can produce some positive effects (in particular, can produce deterrence, comfort victims, rehabilitate or help ‘transition’ societies into liberalism, affirm the national and international law), (ii) comports with popular (and therefore ‘democratic’) desires, or (iii) is compatible with both international humanitarian and human rights obligations.<sup>161</sup>

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<sup>154</sup> Adolfo Ceretti, *Collective Violence and International Crimes*, in THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE, *supra* note 143, at 11.

<sup>155</sup> Pacifique Manirakiza, *Customary African Approaches to the Development of International Criminal Law*, in AFRICA: MAPPING NEW BOUNDARIES IN INTERNATIONAL LAW 35, 60–63 (Jeremy I. Levitt ed., 2008).

<sup>156</sup> *Id.* at 63.

<sup>157</sup> JENNIFER L. DE MAIO, CONFRONTING ETHNIC CONFLICT: THE ROLE OF THIRD PARTIES IN MANAGING AFRICA’S CIVIL WARS 54–56 (2009); Manirakiza, *supra* note 155, at 62–63.

<sup>158</sup> DE MAIO, *supra* note 157, at 54–56.

<sup>159</sup> See generally Manirakiza, *supra* note 155.

<sup>160</sup> Marshall, *supra* note 13, at 66–67.

<sup>161</sup> Jose E. Alvarez, *Alternatives to International Criminal Justice*, in THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE, *supra* note 143, at 26, 37.

Rather than handing over the reins of their accountability to an international body that fails to fully recognize the realities of Africa's political environment, if African nations were to pursue the creation of their *own* dispute settlement mechanism, they might actually accomplish the goal of achieving criminal justice on some level, while simultaneously creating an atmosphere in which peace and the wellbeing of the victims are accommodated goals. One might even go so far as to suggest that in the wake of the ICC's collapse of legitimacy, African states are in fact under an *obligation* to create such a dispute settlement body.

### 3. *The Failure of Existing Mechanisms*

As suggested throughout this paper, there is currently no African Union body responsible for harmonizing economic law. Furthermore, there is no effective African Union criminal or human rights body that incorporates ADR processes into its mechanisms. This final argument thus suggests that *not only* is there a necessity for a comprehensive African dispute settlement body (such as the originally-envisioned African Court of Justice), but that a new structural mechanism should incorporate ADR themes into its processes, since there would appear to be a logical symbiosis between the aims and roles of such a transnational organization, and the aims and roles played by ADR.

Insofar as the incorporation of ADR processes is concerned, if one accepts the premise that the AU and NEPAD are seeking to form a "community" of African nations, but simultaneously legitimize their existence, it seems that a structural ADR mechanism is the most logical approach to take, since ADR's focus can be on entrenching community relations and is based on the aforementioned philosophy of "co-operative problem-solving."<sup>162</sup> Indeed, ADR's recent rise to prominence in the domestic realm has been fueled in part by a "concern with peaceful resolution of disputes from community to global contexts . . . [and] a renewed emphasis on a search for community living and a community justice to match it."<sup>163</sup> This emphasis on *community* is fundamental to the very notion and attraction of ADR as opposed to litigation.<sup>164</sup>

As described above, the envisioned African Union Court of Justice collapsed into the African Court on Human and Peoples' Rights, which itself suffers from severe setbacks, including an unwillingness by member nations

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<sup>162</sup> Marshall, *supra* note 13, at 67.

<sup>163</sup> Mackie, *supra* note 9, at 2.

<sup>164</sup> Marshall, *supra* note 13, at 67.

to grant direct access to individuals and nongovernmental organizations as well as an apparent general lack of enthusiasm for the new Court in its entirety.<sup>165</sup> Most importantly, the only existing medium for resolution of transnational disputes is the ACHPR, a Court which follows adjudicative, Court-based principles fairly closely.<sup>166</sup> There is no real possibility for the Court to propose or involve itself in any ADR-based processes in order to end a given dispute.

This problem may itself be a large reason for *another* challenge facing the Court: the present lack of support for the project (as noted above, as of 2012 only half of the African Union's members have signed onto the new merged Court).<sup>167</sup> As one author puts it so clearly, one "reason why states may be apprehensive about accepting the competence of the African Human Rights Court is an alleged 'African preference' for non-judicial methods of resolving disputes, in which dialogue and conciliation are emphasized."<sup>168</sup>

Indeed, this argument has some weight to it, but there remains a counterargument which suggests that such an analysis fails to fully capture the "reality of present-day African society . . . [where] factors such as increasing urbanization, acculturation, and population concentration have contributed to the disintegration of traditional authority."<sup>169</sup> This counterargument makes the point that the modern African society does in fact require a strict rule-of-law litigation-based regime for the settlement of disputes. Although "the rule of law may be at odds with more communal conceptions of law and social order in some societies . . . [t]his is not necessarily always negative."<sup>170</sup>

In truth, neither analysis is sufficient on its own. In the first place, traditional authority *does* continue to exist and *is* used extensively in rural Africa.<sup>171</sup> However, that is simply not always a good thing—often that traditional form of dispute resolution can yield outcomes that are inherently unfair or undesirable, in which case there is indeed a need for a stronger rule-

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<sup>165</sup> VILJOEN, *supra* note 63, at 456; Ouguergouz, *supra* note 80, at 141.

<sup>166</sup> See generally Ouguergouz, *supra* note 80; ABASS, *supra* note 84, at 289.

<sup>167</sup> VILJOEN, *supra* note 63, at 456.

<sup>168</sup> *Id.* at 458–59.

<sup>169</sup> *Id.* at 459.

<sup>170</sup> Richmond, *supra* note 128, at 53.

<sup>171</sup> Laura Nader & Elisabetta Grande, *Current Illusions and Delusions about Conflict Management—in Africa and Elsewhere*, 27 L. & SOC. INQUIRY 573, 578–79 (2002).

of-law based Court system to play a part.<sup>172</sup> The fact is that ADR processes *have* long played a part in African dispute settlement, that there *is* a tradition that exists outside of the Western litigation mindset of pursuing reconciliation over adjudication. Indeed, it could well be argued that were it not for the advent of colonization and the influx of Western legal norms and cultures, ADR processes would remain today the primary dispute resolution systems in Africa.<sup>173</sup>

Furthermore, and this is perhaps most important, the functions played by ADR processes are directly consistent with—and can be extremely helpful in facilitating—both the economic integrationist project, which forms the mainstay of the African Union's manifesto, and the provision of criminal justice to African politics, without doing so blindly and carelessly; an approach that has been distinctly lacking.<sup>174</sup> There *is* a role to be played for ADR processes.

This all being said, however, the counterargument makes a very valid point, in that ADR processes should not be exclusive. There must be a fallback mechanism which consists of litigation-style adjudication in the traditional (Western) sense which can provide resolution if ADR processes do fail. The two approaches need *not* be in opposition to one another, just as these two arguments need not argue against one another so much as *for* the same point, namely the creation of a dispute resolution mechanism that incorporates ADR themes into its processes, while maintaining a traditional adjudicatory body as a fallback.

In conclusion, when factoring both of these contradictory analyses into account, one comes to the inescapable conclusion that some form of institutionalized mechanism should exist, but that such a mechanism should *not* be exclusively adjudicatory and should be prepared to consider alternative methods and means of dispute resolution without closing itself off to the (legal *and* practical) capabilities of adjudicative resolution. Thus, a structural ADR mechanism would effectively kill two birds with one stone. On the one hand, a form of enforcement mechanism—or, to phrase it differently, a system for resolving disputes between member nations—would engender the legitimacy of the integrative project. At the same time, and on the other hand, a dispute resolution mechanism that takes a more ADR-focused approach would be more in line with traditional African methods of dispute resolution *and* could be more conducive to fostering a community-spirit amongst

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<sup>172</sup> Richmond, *supra* note 128, at 53.

<sup>173</sup> *Id.*

<sup>174</sup> *See, e.g.,* Richmond, *supra* note 128, at 53–54.

African nations than a litigious, adjudication-based mechanism *or* (the worst option) the absence of any dispute settlement mechanism at all.

## V. IMPLEMENTING AN AFRICAN DISPUTE RESOLUTION SYSTEM

Having described in some detail the problem facing the African integrationist project as well as an abstract proposed solution (namely the creation of an African dispute settlement mechanism that incorporates ADR practices), it remains necessary to provide the broad brushstrokes of what such a mechanism would entail. Obviously a precise blueprint for such a mechanism is beyond the scope of this paper; however, there are certain basic elements of such a future mechanism that can be recognized. This section will describe those broad brushstrokes as well as illuminate the opportunity to create this mechanism that is rapidly arising in the form of a new African economic treaty.

### A. Abstract Implementation

The most important test that this new mechanism must pass is the test of whether or not African nations will buy into it. In order to be an effective arbiter of disputes, it is critical that African nations buy into and support the project. Indeed, in all respects, cooperation between African governments is imperative, including broad adherence to a collective set of policies designed to address “impunity on the shores of Africa.”<sup>175</sup>

To this end, two elements are particularly important. First, in order to actually effectuate the aim of legitimizing the African integration experiment, such a judicial body must be genuine in its role as arbiter of disputes. As such, “[t]he most important criterion is independent selection and tenure” of adjudicators.<sup>176</sup> In order to garner the support amongst African nations that it needs, the independence of the adjudicators is critical. A second significant concern vital to the effective and legitimate operation of such a mechanism is the role of legal discretion in facilitating higher goals than simply justice at any price.<sup>177</sup> In this respect and in particular when considering the role that ADR can play in resolving disputes, “[a] judge who accepts integrity will think that the law it defines sets out genuine rights litigants have . . . [b]ut though this requirement honors . . . procedural due

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<sup>175</sup> Nkansah, *supra* note 141, at 81; VILJOEN, *supra* note 63, at 458–59.

<sup>176</sup> Keohane et al., *supra* note 1, at 460.

<sup>177</sup> *Id.* at 461.



process . . . other and more powerful aspects of political morality might outweigh this requirement.”<sup>178</sup> In other words, judges must be careful to consider the political ramifications of their actions. Much as the European Court of Justice has done, they must be mindful of what the integrationist project entails, as well as the fact that the very existence of their institution is to some extent the most legitimizing factor in that project. Judicial discretion will be critical in determining the success or failure of the project.

Two further elements that are critical to the success of the mechanism include the legislative *and* judicial incorporation of ADR themes into the adjudicative processes, in order to present the parties with the best possible form of dispute resolution given the context and details of their particular dispute; and (second) at the same time maintaining some form of adjudication as a fallback measure. As this paper has consistently stated, the presence of ADR methods in the dispute resolution process could be instrumental in creating a package that is desirable to member states, as well as providing an efficient, satisfactory method for resolution of disputes. Scholars in the arena of international criminal justice have noted that the “package, design and implementation of mechanisms for international justice should take into consideration the people who are going to experience the processes and live with the effects of the mechanisms.”<sup>179</sup> In Africa this is particularly resonant considering the failures of the ICC.

Finally, the mechanism must be endowed with sufficient financial and human resources for it to operate “promptly and effectively.”<sup>180</sup> Where previous mechanisms have all been under-financed (which indeed is reportedly responsible for the merger of the African Court of Justice and the Court on Human and Peoples’ Rights) the new mechanism *must* be adequately supported financially. While many African countries struggle with their own economies, financial contributions to the mechanism must be considered an *investment* that will reap significant benefits in the medium to long term. Once Court decisions actually effectuate the integrationist project, and create the opportunity for positive economic conditions throughout the continent, the Court will effectively pay for itself. In this regard, the regional hegemony such as South Africa, Egypt and Nigeria, who have the most to

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<sup>178</sup> DWORKIN, *supra* note 119, at 218–19. Additionally, as a model for the African experiment, it is interesting to note that EU Courts are not governed by precedent—discretion is indeed critical to their efficient (and legitimate) operation.

<sup>179</sup> Nkansah, *supra* note 141, at 81.

<sup>180</sup> Keohane et al., *supra* note 1, at 462.

gain from increased economic integration, should take it upon themselves to spearhead the financing of the mechanism.

As one prominent author notes, the “success of any institution requires the existence of faith in its work, progressive ambition in its focus, and the appropriate moral and financial support from the states that constitute it.”<sup>181</sup> These are the basic elements required for the long-term success of the African integrationist project, and in particular the success of any African dispute resolution mechanism.

### B. *Practical Implementation*

Due to the history of Africa, tainted as it is by interstate as well as intrastate warfare, poverty, exploitation of and by so-called “allies”, and a host of other associated reasons, there is a deep mistrust amongst African nations (and more importantly, their leaders), which is a clear obstacle to the creation of an effective dispute resolution mechanism.<sup>182</sup> Furthermore, and perhaps even more significantly, other problems include a general lack of respect for the rule of law, which has been engendered across the continent:

While of course clientelism and patronage are not unique to Africa, the type of intensive neo-patrimonialism . . . that we can observe across large swathes of the continent is indeed noteworthy. Competition over access to justice, disputes over relevant law, and disagreements over relevant legal authority may reinforce existing social divides, but also have historically created a situation where . . . bypassing the law is “accepted as normal behaviour, condemned only in so far as it benefits someone rather than oneself.” At the same time, there are many fragile states . . . which may not fully control all national territories, or be capable of extending the justice sector and relevant institutions across countries. In such countries, people may choose to, or be compelled to, turn to non-state justice providers. These dynamics pose critical challenges to the promotion of rule of law on the continent.<sup>183</sup>

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<sup>181</sup> JENG, *supra* note 59, at 289.

<sup>182</sup> MEREDITH, *supra* note 123, at 680–88; Munya, *supra* note 90, at 537–39. *See also* YAKUBU, *supra* note 103, at 39 (“It must also be pointed out that unnecessary suspicion among developing countries hampers harmonization.”).

<sup>183</sup> Chandra Lekha Sriram, Olga Martin-Ortega & Johanna Herman, *Promoting the Rule of Law: From Liberal to Institutional Peacebuilding*, in *PEACEBUILDING AND RULE OF LAW IN AFRICA: JUST PEACE?*, *supra* note 128, at 1, 2 (citing to CHRISTOPHER CLAPHAM, *THIRD WORLD POLITICS: AN INTRODUCTION* 49 (1985)).

## CAN THE LEOPARD CHANGE ITS SPOTS?

Indeed, these are all arguments in favor of the creation of such a mechanism, for it would solve at least some if not many of the problems that presently plague the continent:

Economic co-operation enhances the inter-play of legal collaboration and mutual respect between nations that would otherwise suffer from mutual economic suspicion and war. This is more important in Africa where a little spark could cause a great conflagration due to mutual suspicion among the nations . . . *There is nothing as suitable as having a single court for the resolution of matters which may be of common interest . . .* Since legal cooperation brings nations together, this would enhance the spirit of brotherliness among member states.<sup>184</sup>

Before becoming a solution to the problem, however, it is of course necessary to get past the problem itself (a troubling paradox indeed).

Hope is not completely lost, however, for a new integrative experiment is being planned—a free trade zone that will encompass almost the entirety of the continent.<sup>185</sup> This model will follow in the wake of the African Economic Community and will form a significant step in the African integrative experiment. Personal discussions by the author with senior staff members in the South African Permanent Mission to the World Trade Organization suggest that negotiations for this new free trade agreement are ongoing, and it is (in this author's opinion, rather optimistically) hoped that by 2020 such a structure should be concluded.

However, this modern framework may fail to live up to expectations in the absence of a "community of principle" backed up by adherence to law. There is a need to create a mechanism that will enable states to resolve their differences, a mechanism that is backed up by the power of the community, which legitimizes the community and enforces the law, while at the same time doing so *in recognition* of the politics surrounding the dispute. Such a mechanism, relying on ADR models as followed in other international tribunals and mechanisms, may enable the African integrative experiment to finally gain traction.

Indeed, considering the failure of the past models to fundamentally integrate, the new experimental model may present the perfect *new* framework in which to house such a mechanism. Now is the hour for African thinkers and politicians to legitimize their goals and institutional frameworks

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<sup>184</sup> YAKUBU, *supra* note 103, at 64–65 (emphasis added).

<sup>185</sup> JAMES THUO GATHII, *AFRICAN REGIONAL TRADE AGREEMENTS AS LEGAL REGIMES* 386–88 (2011).

through the creation of an effective, efficient, and recognized dispute resolution mechanism.

Within the framework of a *new* African economic partnership in its attempt to follow the European experiment to its present-day reality of peace and relative political unity, there is an opportunity to create the kind of institution that to-date has been lacking within the African arena. Indeed, one might even argue that not only is the opportunity present, but also that the entire experiment will fail as completely as its predecessors in uniting African nations if it does not accommodate and provide for some form of active dispute resolution mechanism with both a judicial *and* ADR role.

It is important, furthermore, not to be tempted into broadening the ambit of the present Court on Human and Peoples' Rights. The present Court serves a critical function in serving the continent's human rights needs. Indeed, with the creation of a new judicial body there is potential to further *limit* the jurisdiction of the present Court to purely human rights matters, thereby "un-complicating" the jurisdictional confusion that might arise. The fear is of course that an increased mandate would throw off-balance the existing mandate, thereby threatening the critical role that the present court plays in the field of human rights. It is thus vital that the new mechanism be distinct from the present Court. Much like the European Court of Justice and the European Court of Human Rights, the two bodies could work closely together, and of course their roles would need to be clarified by legislation upon the creation of the second body. However, it is important to maintain that separation.

## VI. CONCLUSION

If one accepts the premise that economic integration is a good thing, then an enforcement mechanism is necessary. If one accepts the premise that accountability for heinous acts perpetrated by individual state and non-state actors is a good thing, then an enforcement mechanism is necessary. If one accepts the premise that the existing mechanisms were created *for a reason*, then surely an enforcement mechanism is a good thing. Furthermore, if the existing mechanisms are inadequate to do the job, then what role and structure should such a mechanism take?

In the African context, a strictly juridical "rule of law" litigation based system may not be the answer. This is demonstrated by the failings of the ICC in that African governments (a) feel victimized by the ICC's focus on Africa, (b) consider the ICC to be a danger to peace efforts, and (c) have failed to cooperate with the ICC as required under the Rome Statute. These failings, especially when taking into account Africa's history of informal ADR

## CAN THE LEOPARD CHANGE ITS SPOTS?

methods of dispute resolution as used by traditional societies, indicate that an African supranational enforcement mechanism, particularly in the criminal justice context, but also in other areas of expertise (including resolution of trade and commercial disputes), should incorporate ADR processes into its running.

The ECOWAS and EU experiences seem to support this notion and, furthermore, provide models for how such a mechanism could look. Indeed, the African Union originally intended for an African Court of Justice to exist. It is always difficult to draw inferences from the *absence* of an institutional body, but in the present case it seems plausible to rely on the EU experience (where the European Court of Justice has been instrumental in inciting integration) and the intuitive and much-lauded Montesquieuan notion of checks and balances, under which a judiciary is a fundamental component of a legitimate governing body.

Finally, as noted in Section V above, it is beyond the ambit of this paper to outline and describe what such a mechanism would look like in any great detail. Suffice it to say that this paper has drawn an abstract picture of *why* such a mechanism should exist. It would be encouraging to see future academic research that seeks to formulate more specific notions of how such a mechanism should look and function. Indeed, while many academics are quick to judge the failings of existing mechanisms, in this field there is scope for academic contributions to formulate and craft such a future mechanism, thereby contributing to the creation of a solution, rather than outlining the problems themselves (unlike this very article). However, while there is much scope for academic contribution in this matter, the true impetus for the model called for in this paper must come from African governments themselves. While scholars can (and indeed *must*) assist in designing the intellectual framework of such a mechanism from the relative comfort of academia, at the end of the day it is the politicians that will truly shape such a mechanism.

Until such a time as African nations recognize this deficit in their supranational framework, true integration will be lacking, and the immense good that could be achieved from an institutionalized system of enforcement will be notable only by its absence. With a future African free trade area envisioned, *now* is the time for African leaders and governments to take the destinies of their countries into their own hands, and realize Africa's true potential. *Now* is the hour to change history—now is the time for the leopard to change its spots.

